No. 15693

IN THE

# United States Court of Appeals

FOR THE NINTH CIRCUIT

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THOMAS CURTIS BUSH,

*Appellant,*

*vs.*

UNITED STATES OF AMERICA,

*Appellee.*

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## APPELLEE'S BRIEF.

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## I.
## JURISDICTIONAL STATEMENT.

This is an appeal from a judgment of the United States District Court for the Southern District of California adjudging the appellant to be guilty of a single-count Indictment (see statement of case below) which Indictment was brought under the provisions of Section 2421 of Title 18, United States Code. [R. 415, 416, 427.][1] The violation is alleged to have occurred in Los Angeles County, California within the Central Division of the Southern District of California.

The jurisdiction of the District Court is based upon Section 3231 of Title 18, United States Code. This Court has jurisdiction to entertain this appeal and to

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[1]The abbreviation "R." refers to the Reporter's Transcript of the record.

review the proceedings leading to said judgment by reason of the provisions of Sections 1291 and 1294 of Title 28, United States Code.

## II.
## STATEMENT OF THE CASE.

An Indictment in one count was filed on January 3, 1957 charging the appellant essentially as follows:

That on or about November 1, 1956, appellant knowingly transported one Farlena Jo Hickey from Texas to the Southern District of California for prostitution, debauchery and other immoral purposes. On January 14, 1957, the appellant was arraigned in the United States District Court and entered a plea of not guilty.

On February 11, 1957, a hearing was had on defendant's motion to inspect documents and papers and on the defendant's motion for bill of particulars. The Court granted the defendant's motion to inspect all documentary evidence to be used in the case and ordered all said material to be made available to counsel for the defendant on that same day. The Court denied the defendant's motion for bill of particulars. The defendant made a motion for an examination of jurors on *voir dire* and for the names and addresses of the prospective jurors. The Court denied the motion without prejudice. [T. 3 and 4.][2] This motion was renewed on February 12, 1957 and was again denied. [T. 5.]

The jury was impaneled on February 12, 1957 and the trial commenced on that date. On February 13, 1957, the Government rested. The defendant moved for a judgment of acquittal and the Court denied the motion.

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[2]The abbreviation "T." refers to the Clerk's Transcript of the record.

The defendant then made a motion that the Government produce any and all "make sheets" or "rundowns" on Farlena Jo Hickey or Mrs. Watson. This motion was denied. [T. 9, and R. 269.] The verdict was returned on February 15, 1957. Judgment was entered on March 4, 1957. [T. 13.] On March 4, 1957, a motion was made for a new trial which was denied by the Court. [T. 18.] Notice of Appeal was filed on March 13, 1957. [T. 20-21.]

## III.
## STATEMENT OF THE FACTS.

On February 11, 1957 a motion was made by the defendant for the names and addresses of the prospective jurors. [R. 11.] This motion was denied as indicated on the record of February 12, 1957. The Court stated the policy of the District Court and further ruled that the motion was untimely. [R. 12.] The defendant requested through counsel that he be allowed to personally *voir dire* the jury. Defendant's motion was denied. The defendant then made a motion to dismiss. This motion was also denied. The Court informed the defense counsel of the District Court's policy regarding *voir dire* of jurors: that it is by the Court and that counsel may submit any further questions which they desire to ask of the jurors and the Court will ask the questions. [R. 12-13.] During the selection of a jury, the prospective jurors were instructed as to the presumption of innocence and that it applied throughout the trial and they were asked if they understood this. [R. 15.] The Court again instructed the jury as to their function and that the Court was not interested in what their verdict might be. [R. 22.] At the outset the Court instructed the jury that any remarks of the counsel or the Court was not evidence and it was not to be considered by the jury as evidence. They were instructed that the jury is the sole judge of the evidence and the facts. [R. 30.]

Miss Hickey testified under her married name of Mrs. Watson, that she met the defendant in Dallas, Texas in August or September, 1956 at a drug store and thereafter had three or four dates with him. [R. 32-33.] The defendant suggested to Miss Hickey that she go to Beaumont, Texas, and work there as a prostitute. This conversation between the defendant and Miss Hickey took place in Dallas, Texas. The substance of the conversation was that Miss Hickey was to be taken to the house of prostitution, the Dixie Hotel, in Beaumont, Texas by the defendant. Miss Hickey was instructed how she was to act there and how she was to get into the hotel. The defendant and Miss Hickey went by plane from Dallas to Beaumont, Texas. [R. 33-37, 40-41, 43-44 and 55.] After arrival in Beaumont, Miss Hickey was taken to the house of prostitution, the Dixie Hotel. [R. 196.] Miss Hickey worked there as a prostitute for approximately three weeks and later returned to the house of prostitution. [R. 43-45, 51.] The defendant and Miss Hickey had a conversation in Dallas, Texas, before leaving for Beaumont, Texas in which conversation Miss Hickey was instructed by the defendant how she should perform her acts of prostitution; the prices to be charged; and the percentage which she would receive. [R. 34, 35, 38, 39, 40.]

While Miss Hickey was working as a prostitute in Beaumont, Texas, the defendant took Miss Hickey and his wife, Mickey, who was also a prostitute at the Dixie Hotel, to Houston, Texas [R. 49-50] for one or two days. After the trip the defendant returned Miss Hickey to the Dixie Hotel. [R. 51.] At the conclusion of her stay at the Dixie Hotel, Miss Hickey left the hotel with Mrs. Bush and met the defendant at a drive-in in Beaumont [R. 59-60] and the three of them traveled to

Houston and Dallas in the defendant's car. Enroute to Houston and Dallas, the defendant told Miss Hickey that he was going to take her to California and place her in a house of prostitution. [R. 64.] The defendant transported Miss Hickey from Texas to Los Angeles County, California. [R. 65, 66, 67.] The defendant placed Miss Hickey in a house of prostitution in San Pedro. [R. 76, 77.] Miss Hickey gave monies received from prostitution to the defendant. [R. 77, 78.]

Defense counsel, Mr. Graves, after repeatedly asking various questions pertaining to whether or not Miss Hickey had had any acts of prostitution before she met the defendant, asked the question, ". . . after you left your husband had you taken any trips in which you engaged in sexual intercourse with any man for any reward or gift." [R. 97, line 7.] This question had been asked in several different ways and answered prior to this occasion. [R. 87, 88, 89, 90, 91, 92, 93, 95, 96, 97.] In response to this question the Court commented (referring to defense counsel), "He is having a good time, don't worry." [R. 97, line 13.] Other questions were asked by the defendant's counsel as to Miss Hickey's place of work, her age and that she had given a false age in applying for work. At this time the Court stated that this line of questioning was immaterial. [R. 98, line 2.] Defense counsel then began to explain his theory of the case. Defense counsel explained that his theory was that the defendant's state of mind had been innocent throughout and that the defendant had been duped by the girl. The Court in response to this theory stated, "Do you mean to say that this defendant here is an innocent individual that has been duped by this young girl?" No objection was taken or made at this time. This statement of the Court was later objected to in chambers beyond the pres-

ence of the jury. The defense counsel asked for a mistrial. This motion was denied. [R. 105-106.] The defense counsel continued to cross-examine Miss Hickey concerning various phases of her life and her relationship with the defendant; the reasons why she became a prostitute; and the acts she would be performing as a prostitute. [R. 107-127.] During a colloquy between the Court and the defense counsel, the Court made the statement at page 127, line 20, "You may get a certain amount of personal satisfaction out of asking those questions but it doesn't tend to prove or disapprove anything in this case." Defense counsel has assigned this statement as misconduct by the Court. [R. 127-128.]

At the conclusion of the first day's testimony the Court instructed the jury to disregard the statements between the Court and counsel and that they were not to be considered as evidence. [R. 161-162.] On the second day of trial at page 194 during recross-examination of Miss Hickey, the defense counsel assigned as error and misconduct the following statement of the Court, "Counsel, every question you ask this girl surprises me that she hasn't broken down before under the very humiliating situation we have here." The Court instructed the jury at this time that they were to disregard the Court's comment and it was in no way to be a reflection upon the defendant. [R. 194, line 13.] Mrs. Bush testified that her husband, the defendant, took Miss Hickey to California. [R. 300.] Mr. Bush, the defendant, stated that he took Miss Hickey to California. [R. 322.] At the close of all the evidence the Court again admonished the jury that the comments of counsel and the Court had nothing to do with the merits of the case, or any disagreement had between counsel and the Court and was not to be considered as evidence. [R. 406, 407, 409.]

## IV.
## ARGUMENT.

### Introduction.

Two opening briefs have been filed: one by the appellant in pro. per. and the other by his attorney, Mr. Arthur Warner, Esquire. Each brief raises different points on appeal. However, the first point raised by the appellant pro. per. is basically the same as that raised by Mr. Warner in his brief. In his brief Mr. Bush, the appellant, raised the following four points:

1. "The Court committed prejudicial misconduct in comments made to counsel within the hearing in [sic] the presence of the jury and during these proceedings of the case which statements were duly objected to and to which motion of withdrawal of the jury were [sic] denied."

2. "The Court erred in instructing the jury on the credibility of the witness, Mrs. Watson—Farlena Jo Hickey—when the Court instructed the jury they could consider this witness the same as they consider [sic] any other witness in the instant case."

3. "That the Court erred in denying the defendant the right to have his counsel personally voir dire the jury. Said error [sic] compounded the error in refusing to give specific names and addresses of the jury referred to (motion filed February 20. 1957, No. 2554-CD, Notice of Motion for the Trial)."

4. "The Court committed prejudicial error and gross misconduct towards the counsel for the defendant on or about March 4, 1957, Los Angeles Central Division, United States District Court, Southern District of California, the Court made dictum (Jury was not present) 'Counsel you are a shyster—the only reason you took this case was to win it on appeal.' "

The three points urged by Mr. Warner in his brief for the appellants are as follows:

1. "The trial court committed prejudicial error by making comments in the presence of the jury which reflected upon the ability of the defense counsel, impugned the defense counsel, indicated the Court's disbelief in appellant's testimony and indicated belief in the prosecutrix's testimony."

2. "The trial court committed prejudicial error in permitting testimony of alleged misconduct by appellant and related to the charge in the indictment."

3. "The trial court committed prejudicial error when it denied appellant's motion to require the Government to produce 'make sheets' or 'rundowns' of the prosecutrix contained in the Government's file on the ground that such documents are confidential."

For the purpose of this brief Point One by Mr. Bush and Point One by Mr. Warner will be considered to be the same point. Thus the appellee will refer to them as six separate points only.

### A. Alleged Misconduct of the Court.

The appellant is his briefs has alleged that certain statements of the trial court constituted prejudicial error. Specifically the appellant claims that such statements reflected upon the ability of defense counsel; impugned the the integrity of defense counsel; indicated the trial court's disbelief in appellant's testimony; indicated belief in the "prosecutrix's" testimony; that the trial judge was adverse to the defendant from the start; that the appellant was hampered and restricted in the presentation of his defense.

At best, it is difficult to determine in the vacuum of appellate procedure, the effect of statements and conduct by the trial court upon the results of this case. And yet, that is first issue here presented.

Due to the imperfections of language and words, the meaning of one's mind is expressed also by other factors: facial expression; voice inflection; and gestures. Since these features were not recorded, one must look to the setting, surrounding circumstances, context and the entire proceeding to determine the true meaning of the alleged statements of the trial judge. *Ochoa v. United States* (9 Cir., 1948), 167 F. 2d 341; *United States v. Warren* (2 Cir., 1941), 120 F. 2d 211, 212.

The words of the trial judge are not be isolated for assessment, nor are specimens of his comments to be wrested out of context and measured against intriguing generalities, which would make otherwise inoffensive comment appear prejudicial. *United States v. Thayer* (C. A. Wis., 1954), 209 F. 2d 534.

Rule 52, F. R. Cr. P., any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded.

If we could have been at the trial proceedings, we could certainly have judged more perfectly the true meaning of the trial judge's statements. However, others were present from whose judgment of the time we may here consult. The party most likely to complain of error by the trial judge would be the defendant's attorney, since it is his duty to preserve the rights of the defendant.

It is significant to here note that the first thirteen underlined statements by the court which Mr. Warner sets forth in his brief as alleged error were not objected to at the

time they were made. (Mr. Warner's Br. for the App. pp. 4-9.)

This Court in the case of *Albert v. United States* (9 Cir., 1937), 91 F. 2d 461, said that allegedly objectionable matters in a criminal prosecution, not properly objected or excepted to in the trial court, would not be considered on appeal.

Apparently the only exception to this rule, as stated in *C. I. T. Corp. v. United States* (9 Cir., 1945), 150 F. 2d 85, is that the Court of Appeals will consider claimed error, not excepted to, only far enough to see that there has been no miscarriage of justice.

An appellate court should be slow to reverse a case for alleged misconduct of trial court unless it appears that conduct complained of was intended or calculated to disparage the defendant in the eyes of the jury and to prevent jury from exercising impartial judgment on the merits. *United States v. Glasser* (C. C. A. Ill.), 116 F. 2d 690, modified on other grounds, 315 U. S. 60, 62 S. Ct. 457, 86 L. Ed. 680.

Conduct of trial judge in rebuking or punishing attorney during trial does not warrant reversal unless clearly prejudicial. *Newman v. United States* (C. C. A. Wash., 1928), 28 F. 2d 681, cert. den. 278 U. S. 839, 49 S. St. 253, 73 L. Ed. 986.

The first issue raised in determining this first point is, do the statements of the trial judge which were not objected to at the time of trial amount to a miscarriage of justice?

These thirteen statements occurred at varying intervals over 100 pages of transcript.

One of the statements was made beyond the presence of the jury. [R. 106, lines 14 to 17.]

Any remarks made beyond the presence of the jury could not have been prejudicial. To be prejudicial, the prejudice must develop in the mind of the party who holds the power of conviction. Here, that party is the jury. Obviously, no prejudice can arise where a statement was made which was not heard by the jury.

The state of the Court at page 101, lines 7 and 8, was not objected to, but rather defense counsel followed the statement by "Thank you, your Honor, I appreciate that."

The only statement among the first thirteen as set forth by the appellant really worth mentioning is the statement of the Court at page 99, lines 7-9. No objection was made at this time. An objection to this statement was later made in chambers. [R. 105, 106.]

At the beginning of this colloquy on page 98, a discussion developed as to what theory the appellant was defending his case. After defense counsel explained that he "should be permitted to show that the state of mind of the appellant was innocent throughout . . ." and that "the girl as a professional prostitute duped the defendant and tried to lure him into an entrapment in this very court on the grounds to get out of some trouble of her own." To which the Court asked the question, "Do you mean to say that this defendant here is an innocent individual that has been duped by this young girl."

The appellant contends that the jury received this statement as evidence of the Court's mind. This does not necessarily follow. The statement was in the form of a question. The jury had been listening to the defense counsel explain a hard-to-believe theory of defense. A seventeen-year old girl, who according to her just elicited testimony, had never been involved in prostitution, was supposed to have lured a much older, more experienced

man, whose wife was a prostitute at the same place where the witness was taken to begin her prostitution activities, into a trap culminating in the Federal Court.

The Court may have exhibited normal surprise. However, the Court's next statement was "If that's your presumption, go ahead." Thereafter, the appellant was permitted to continue to attempt to develop this theory. In the absence of a showing of anything further, how could such action be unfair and impartial?

In the case of *Lewis v. United States* (C. C. A. Mich., 1926), 11 F. 2d 745, 747, the trial court's questioning of defendant's petition on certain evidence introduced by the government during its case-in-chief, though not approved, was not ground for reversal.

The appellant contends generally that one of the Court's statements indicated the Court's disbelief in appellant's testimony. However, there is no specific statement as to which one does so. Certainly, the question asked by the Court regarding the defense theory of case cannot be construed as indicating disbelief in appellant's testimony since the appellant hadn't testified as yet nor had any defense witnesses testified. The same reasoning would apply to other statements of the Court which are assigned as error, since all of them, with the exception of the one made at the time of sentencing, occurred while defense counsel was cross-examining the victim, Miss Hickey.

Even if the statement alleged, whatever it may be, is construed to be a comment by the Court on the appellant's testimony, such was not improper.

Comment of the Court on facts and expressions of opinion adverse to the accused, were not error, where the Court clearly left questions to the jury. *Ng Sing v. United States* (C. A. Cal., 1926), 8 F. 2d 919. A statement

by the judge in his charge that he did not believe the testimony of defendant as to a fact, with further comment on the effect of the failure of courts and juries to properly function in enforcement of the laws, was not reversible error, where he distinctly told the jury that they were not to be controlled by his opinion, but must determine the facts for themselves. *Fulkerson v. United States* (C. C. A. Wash., 1924), 2 F. 2d 667.

A federal district judge may, in his discretion, express his opinion upon the evidence and credibility of witnesses provided that jury is made to understand that it is in no way bound by any such observations but is the sole judge with respect to issues of fact; and likewise he has the duty to admonish counsel when necessary, provided he does so in temperate language. (*United States v. Stayback* (C. A. N. J., 1954), 212 F. 2d 313.)

The record is replete with statements of the Court to the jury that it should disregard any statements between the Court and counsel and that the jury was the sole judge of the evidence. (See statement of facts.) Such action is in conformance with the rules laid down by the case.

Certain statements of the Court are alleged to be error in that it was an indication that defense counsel was taking undue time. (Mr. Warner's Br. pp. 12-13.) [R. 147, 148, 158, 179, 191, 227.]

It is conceded that these statements indicate that. However, it does not logically follow that this was prejudicial to the appellant. The Court at several places on the same occasions indicated that even though he was concerned with the amount of time being spent on cross-examination of the victim, he would give them all the time defense counsel wanted. This did not restrict or

confine defense counsel in cross-examination or in the presentation of his case.

District Court's comments, which exhibited no more than a natural impatience with extensive amount of time being consumed at trial of an uncomplicated case, were not so prejudicial as to justify reversal on grounds that judge's statements could be taken by jury as indicative of an attitude of prejudice towards defendant, his counsel or his cause. (*Pacman v. United States* (C. C. A. Cal., 1944), 144 F. 2d 562, cert. den. 323 U. S. 786, .... S. Ct. 278, 89 L. Ed. 627, reh. den. 323 U. S. 818.)

During further cross-examination of Miss Hickey, Mr. Graves continued asking questions regarding very personal phases of her life in an attempt to break her story. Counsel's questions were detailed, repetitious and most of them irrelevant. [R. 107-127.] Defense counsel had been asking questions concerning the acts she would be performing as a prostitute; how much money she would be making; her physical examination; her conversations with the appellant leading up to her becoming a prostitute. After unsuccessful attempts to get her to reveal conduct which would fit into the defendant's theory of the case, defense counsel would ask similar questions which were basically repetitious.

When the Court attempted to explain to counsel that this line of questioning was immaterial, delicate and embarrassing, a colloquy ensued between the Court and defense counsel. [R. 125, 126, 127.] On page 127, the Court said, "You have been asking her about the most delicate things you can ask a woman."

Mr. Graves replied: "Yes, your Honor. I want to show the whole story." Defense counsel here agreed that these were the most delicate things you could ask a woman,

and yet he wanted to persist and go into all the details. His attempt at impeachment had failed to take place by this time. The Court had permitted counsel to go into every phase of her activities or conversation in great detail. When it became apparent that further repetitious questions would not avail the progress of the trial, and when this should have been apparent to defense counsel, the Court made the alleged prejudicial statement. [R. 127, lines 20-22.]

The Court continued. [R. 128, lines 2, 3.]

Defense counsel objected to these remarks in the alternative. [Lines 4-6.]

At line 20, counsel asked, "May I be permitted to have a reasonable latitude to go into that?

The Court: Certainly . . ."

Never at any time did the Court make any remarks which were directed towards the appellant in any way. No inferential remarks were made or alluded to in the course of the trial.

Other alleged prejudicial statements of the Court were basically of the same character, in that the Court was attempting to make counsel aware of the immateriality, uselessness, and futility of counsel's repetitious cross-examination.

After this particular colloquy, the Court instructed the jury that it should disregard the Court's comments and that it was in no way to be a reflection upon the appellant. [R. 194.]

The action of the Court in reprimanding defendant's counsel and unfavorably commenting on their conduct is not ground for reversal unless it involves palpable injury to accused or affects his substantial rights. (*Cook v. United States* (C. C. A. Tex., 1925), 4 F. 2d 517.)

If judge has been patient, heard fully and fairly, the defendant is required to show error which is reasonably prejudicial. (*Baker v. United States* (C. C. A. La., 1946), 156 F. 2d 386, cert. den. 329 U. S. 763, 67 S. Ct. 123, 91 L. Ed. 657, reh. den. 329 U. S. 829.)

A strongly reasoned case decided by this Honorable Court is that of *Shockley v. United States* (9 Cir., 1948), 166 F. 2d 704, 711, 712, reh. den. In that case, remarks of the trial judge directed toward defendant's counsel, were not prejudicial in view of the specific instructions that the jurors must wholly disregard Court's rulings and comments during the trial and that because the Court had admonished counsel, the jury should not draw any inferences therefrom.

The appellants contended that the attitude, demeanor, activity and expression of the trial judge were little less than shocking to a sense of justice.

This appellate court at pages 711, 712 said it could not "believe that these comments between court and defense counsel so misled and prejudiced jurors that they became partisans of the prosecution. We cannot abandon our faith in the capacity and desire of a Federal jury to avoid being mired in irrelevancies, and the record does not reveal that the jurors . . . were inspired to render a verdict not based entirely on the evidence admitted by the Court."

For the full effect of this opinion, this Honorable Court's attention is directed to page 712 of the opinion which in effect says that improper statements may be cured by appropriate instructions to the jury.

In the case at bar, the trial court made several specific instructions similar to the ones referred to in the opinion of the *Shockley* case.

See also:

*Steinberg v. United States,* 162 F. 2d 120, cert. den. 332 U. S. 808, 68 S. Ct. 108, 92 L. Ed. 386.

The facts of this case were little in dispute with the exception of the mental intent of the appellant. But from the basically uncontested facts, it may easily be inferred that the requisite intent was there present. Where guilt is clearly shown, some cases have held that no prejudice exists. (*United States v. Domres* (7 Cir.), 142 F. 2d 477, cert. den. 322 U. S. 723; *United States v. Krakower,* 86 F. 2d 111.)

Generally the test is whether or not the appellant has been prejudiced and has been denied his right to fair trial.

*Brink v. United States* (C. C. A. Ohio, 1932), 60 F. 2d 231, cert. den. 287 U. S. 667, 53 S. Ct. 291, 77 L. Ed. 575;

*Hargrove v. United States* (C. C. A. Okla., 1928), 25 F. 2d 258;

*United States v. Katz* (C. A. Pa., 1949), 173 F. 2d 116;

*United States v. Echeles* (C. A. 7, 1955), 222 F. 2d 144, cert. den. 350 U. S. 828, 76 S. Ct. 58, 100 L. Ed. 739;

*United States v. Varlack,* 225 F. 2d 665;

*United States v. De Marie,* 226 F. 2d 783, cert. den. 350 U. S. 966, 78 S. Ct. 436, 100 L. Ed. 839;

*Withrow v. United States,* 1 F. 2d 858;

42 *L. R. A. (N. S.)* 428;

*Iva Ikuko D'Aquino v. United States* (9 Cir., 1951), 192 F. 2d 338, 367;

*Garber v. United States* (6 Cir.), 145 F. 2d 966, 974.

*Magen v. United States* 24 F. 2d 325, holds as follows:

> "In regard to the objection that the remarks of the trial court were such as to prevent a fair trial we are not persuaded that the constant reiteration by the attorney of his complaints against the judge was not calculated to prejudice the court, rather than the attorney or his client. The attorney was allowed to bring out on cross-examination any facts he might reasonably desire, and he called no witness except a deputy clerk of the District Court, who merely gave some unimportant evidence as to the record in his office.
>
> "The proof of guilt was substantially uncontradicted and the reliance of the defense was on points of law rather than on the facts. To hold that personal altercation, having no real relation to the merits of the litigation, causes a mistrial, would be to reward a defendant for the shortcomings of his lawyer in a case where it is mere speculation to say he suffered any prejudice."

And finally, in the case of *United States v. Dennis* (2 Cir., 1950), 183 F. 2d 201, cert. granted 340 U. S. 863, 71 S. Ct. 91, 95 L. Ed. 630, aff'd 341 U. S. 494, 71 S. Ct. 875, 95 L. Ed. 1137, we find these pertinent facts:

The trial was punctuated over and over again with motions for mistrial obviously for patently frivolous reasons. The judge found the action of the attorneys to be a deliberate and concerted effort to wear him down. The Court of Appeals found that such a concert would have been manifested in precisely the same form.

The judge, at times, rebuked the attorneys, he used language short of requisite judicial gravity; he warned if

their actions persisted, he would punish them when the trial was over. The court continued to instruct the jury that they were not to take what he said to the attorneys against their clients; the test applied there—did he weigh the scales against the defendants; did he confine defendants in presentation of their case?

> "Justice can be as readily destroyed by the flaccidity of the judge as by his tyranny; impartial trials need a firm hand as much as a constant determination to give each one his due."

The facts of this case as applied to the cases cited above lead us to the conclusion that no prejudicial error was committed by the trial judge. He gave ample opportunity to cross-examine and to present the defense. He used moderate language. He made no remarks directed towards the defendant. Several times in addition to the final instructions, the court admonished the jury that it should disregard remarks of the court and counsel; that such was not evidence; that the jury was the sole judge of the evidence; that any remarks directed toward counsel should not be inferred to reflect in any way upon the defendant; that to do so would be grossly unfair; that by the court's remarks, it did not intend to express any view as to what verdict the jury should reach; that in fact, the Court was not interested in the verdict. In the face of this kind of record, it would be pure speculation to conclude that the comments of the Court had prejudiced his rights.

## B. Alleged Error in Giving Instruction Re the Testimony of the Woman Transported.

Exception was taken to a portion of one instruction at R. 424, lines 14-21, ". . . that her testimony 'may be viewed in the same light as any other witness.'" The defense counsel stated that this was "erroneous under the law that her testimony should be carefully scrutinized although she is not an accomplice, but she is a participant."

Was this error to so rule? In a prosecution for violation of former Section 398 of this title, the refusal of requested charge that testimony of girl involved should be considered with great caution and subjected to the closest scrutiny by the jury was not reversible error although she had made statements to the F. B. I. inconsistent with her testimony at trial but it was corroborated in several material respects and the jury had ample warning that she was ill disposed towards the defendant. *United States v. Krulewitch* (C. C. A. N. Y., 1948), 167 F. 2d 943, reversed on other grounds 336 U. S. 440, 69 S. Ct. 716, 93 L. Ed. 790. The trial court and the appellant seemed to agree on the point that the witness, Miss Hickey, was not an accomplice. [R. 419, lines 12, 13.] The appellant believed that because of her participation, her testimony should be carefully scrutinized. The trial court had given an instruction to this effect earlier at page 415, lines 8-12.

> "The jury should take into consideration the fact that Farlena Jo Hickey admits that she was involved in this transportation, in passing on her testimony. The jury should therefore carefully scrutinize her testimony in light of the view of all the circumstances."

The desired instruction was here given.

The exception to the instruction given at page 424 then is only an exception if that instruction is inconsistent with

the first one so as to invalidate its effect. To determine this, all of the instructions relating to this witness and witnesses in general should be considered as a whole. 25 Fed. Dig. 407, and Pocket Parts pp. 75-76.

In addition to the instruction just mentioned above, the trial court gave these other instructions:

> "However, you may consider the character of Farlena Jo Hickey in the same manner as you would consider the character of any witness who had testified in the trial of this cause for the purpose of determining whether or not she had told the truth.
>
> "You are instructed that the woman transported is not an accomplice to her transporation whether she does willingly or unwillingly, and her testimony may be viewed in the same light as that of any other witness and it need not be corroborated if you are willing to believe it alone and without corroboration." [R. 419, lines 7-17.]

Prior to this, the trial court gave the general rules by which all witnesses' testimony should be weighed and evaluated. [R. 412, line 20, to p. 413, line 19.]

In instructions which stated that the jury should scrutinize with care the testimony of one they considered an accomplice, and which was followed by an instruction that the weight and credit to be given to the testimony of the person who has admitted a part in the commission of a crime is for the jury to decide, was proper. (*United States v. Echeles,* 222 F. 2d 144, *supra.*)

While the Courts of Appeals seem to be divided on the issue of whether or not the jury should be instructed to receive the testimony of an accomplice with caution, the majority seems, of course, to favor such an instruction. However, they hold that it is not reversible error to refuse

to give such instruction. (*Stoneking v. United States*, 232 F. 2d 385, cert. den. 352 U. S. 835, 77 S. Ct. 54, 1 L. Ed. 2d 54, cert. den. 354 U. S. 941, reh. den. 355 U. S. 852.)

A woman transported in interstate commerce is not an accomplice to her transportation. (*Levine v. United States*, 163 F. 2d 992.)

It necessarily follows that since Miss Hickey was not an accomplice, as defense counsel so intimated, the appellant was not absolutely entitled to an instruction cautioning the jury to weigh with caution Miss Hickey's testimony.

The case at bar is very close to the *Echeles* case, *supra*. Even though the jury there as here was cautioned in the use of the testimony of the witness, in both cases, the jury was instructed that it should decide.

This is what the alleged erroneous instruction in this case meant. It was merely a way of saying "nevertheless, you must decide for yourselves. You are to use the same tools of measurement in weighing the testimony of this witness as you would any other witness." The court had already given the jury the tools by which it should weigh and measure the testimony of all witnesses.

This was consistent with the basic principle that the jury is the sole judge of the weight and credibility of the witnesses. Any instruction restricting this function, for or against the appellant, would have been improper. (*Weiner v. United States* (C. C. A. Wis., 1936), 82 F. 2d 305, cert. granted, 298 U. S. 652, 56 S. Ct. 956, 80 L. Ed. 1380, aff'd 299 U. S. 92, 57 S. Ct. 79, 81 L. Ed. 58.)

Trial court has the duty to explain to the jury that they are the judges of the credibility of witnesses and to charge

them that every circumstance appearing in evidence, bearing upon such credibility, is to be considered in connection with witnesses' testimony in order that the jury may determine the weight to give testimony.

Under the general case law, we must conclude that the court's instructions were correct. (*Ghadiali v. United States* (9 Cir., 1927), 17 F. 2d 236; *Miller v. United States* (9 Cir., 1938), 95 F. 2d 492; *Jones v. United States* (C. A. Penn., 1956), 230 F. 2d 485.

## C. Alleged Error of the Trial Court in Denying the Appellant's Request for the Names and Addresses of the Prospective Jurors and to Personally Voir Dire the Veniremen.

It is submitted that no Constitutional right of the appellant was infringed upon by the order of two separate District Court Judges on February 11 and 12, 1957, denying the appellant's request for the names and addresses of the prospective jurors and to personally voir dire the veniremen.

With the exception of capital cases such as treason and murder (18 U. S. C., Sec. 3432), we know of no rule or provision requiring the Clerk or the Court to divulge prior to trial the names of prospective jurors.

In fact, the law would seem to be that it is improper to make such divulgement. Prospective jurors should not be subject to neighborhood interview, etc. It is well established by reason of the Professional Ethics of the American Bar Association and by respectable authorities, that jurors should not be subjected to inquiry after they have arrived at their verdict. If it be the rule that jurors should not be harassed and investigated after the return of their verdict, all the more so should no investigation

be conducted prior to their service. For a discussion and collection of authorities on the subject of the impropriety of investigating jurors, subsequent to verdict, see those collected and discussed by Judge Mathes in *United States v. Schneiderman,* 106 Fed. Supp. 906, 925 (1952).

There is no violation of the Constitutional guaranty in the rule of this Court in refusing to furnish information on prospective jurors. The Sixth Amendment guarantees in criminal cases:

> ". . . to a speedy and public trial by an impartial jury of the State and district wherein the crime shall have been committed, . . ."

This does not require the providing of the names and addresses of prospective jurors. There is a presumption that jurors called are fair jurors and will decide a case upon the evidence and instructions of the Court. Rule 23, F. R. Cr. P., makes no provision for the supplying of the names and addresses of propective jurors.

The rule that applies is Rule 24(a) of the Federal Rules of Criminal Procedure. The rule has never, to our knowledge, been held to be unconstitutional.

It is appellee's view that substantially all of appellant's contentions urged have been answered by a recent opinion of this Court. That case is:

> *Hamer v. United States* (No. 15688), August 26, 1958, 259 F. 2d 274, rehearing denied.

We shall not repeat the arguments or authorities the Government presented in its brief in the *Hamer* case, nor here refer to the cases and comments of this Court in the *Hamer* opinion. We submit the authority of the *Hamer* case applies to the facts of this case.

Rule 24(a) with reference to examination of prospective jurors makes it discretionary with the Court to conduct voir dire examination itself or permit interrogation by counsel. A Federal Rule of Criminal Procedure has the force of a statute and hence will abrogate a contrary principle of common law. (*Rattley v. Irelan* (C. A. D. C., 1952), 197 F. 2d 585, 586.)

Another interesting aspect is presented by Rule 57(b), F. R. Cr. P., which states:

> "If no procedure is specifically prescribed by rule, the Court may proceed in any lawful manner not inconsistent with these rules or with any applicable statute."

The Notes of the Advisory Committee on Rules, Note (b), states:

> "One of the purposes of this rule is to abrogate any existing requirement of conformity to State procedure on any point whatsoever."
>
> ". . . it seemed best not . . . to prescribe a uniform practice as to some matters of detail, but to leave the individual courts free to regulate them either by local rules or usage. Among such matters are the mode of impaneling a jury . . ."

The trial court in this case followed the usual procedure of the United States District Court in this regard. (See Statement of Facts above). During the Court's voir dire of the jurors, counsel for the appellant was given every opportunity to submit questions to the Court which were then passed upon by the Court. All the questions so submitted by the appellant to the Court were submitted to the veniremen if the question was proper or if it had not specifically been asked by the Court before or in some

other way. The appellant made no objections to the questions submitted by the Court and took no exceptions for failure to submit any questions so requested by the appellant.

After the conclusion of the voir dire examination by the Court, the appellant, through counsel, stated he had no further questions.

It is concluded that the actions of the trial court concerning these matters, gave the appellant adequate opportunity to inquire of the veniremen in order to impanel a jury of his choice.

It is also concluded from the case law cited that the appellant had no right to know before the trial the names and addresses of the prospective jurors and that the denial by the trial court in this respect was not error.

### D. Alleged Misconduct of the Court on March 4, 1957, at the Time of Sentencing, in Statements Made Towards Defense Counsel.

The verdict was returned by the jury on February 15, 1957, (See, Statement of Case, above). The statement alleged to have been made by the Court on the 4th of March, 1957, was not designated as a part of the original reporter's transcript of the proceeding. It is set forth in the supplemental record. [R. A2, A3.] This statement was made more than two weeks after the jury had returned its verdict.

To be prejudicial, it must affect the ones whose duty it is to ascertain the facts. The test applied in the *Schockley* case, *supra,* at pages 710, 711, was, did the conduct of the Court so mislead and prejudice the jurors that they became partisans with the prosecution. Since the facts had been presented and determined prior to the making of this

statement, it is inconceivable how any statement made by the Court at that time could have prejudiced the defendant.

The word prejudiced has been defined: "if reasonably calculated to erroneously affect the jury in reaching its verdict." (*Sonken-Galamen Corp. v. Hillman Tex. Civ. App.*, 111 S. W. 2d 853, 856.)

It is concluded that since the jury was not present, it could not be affected by any such remark and is therefore not prejudicial.

**E. Alleged Error of the Trial Court in Permitting Evidence of Alleged Misconduct of the Appellant.**

The appellee concedes that it is the general rule that evidence of the appellant's misconduct or criminal character is inadmissible to establish probability of guilt. (*Benton v. United States,* 233 F. 2d 491.)

However, the appellee contends that there are several exceptions to this rule:

(1) to impeach the appellant as a witness by a showing of a prior felony conviction; 24 Fed. Dig. 366-371.

(2) to show specific intent, knowledge, motive, design or scheme. (*United States v. Iacullo* (C. A. Ill.), 226 F. 2d 788, cert. den. 350 U. S. 966, 76 S. Ct. 435, 100 L. Ed. 839.)

The test which seems to be applied in such case is: was the evidence of misconduct relevant to the issues which must be proved before a violation of the law exists. (*United States v. Wall* (C. A. Ill.), 225 F. 2d 905, cert. den. 350 U. S. 935, 76 S. Ct. 307, 100 L. Ed. 816.)

In a trial charging the appellant with the interstate transportation of a woman for immoral purposes, the intent of the defendant is a vital issue.

Here, the other elements of the offense were not in issue. The whole defense was based upon the intent of the appellant that he had no such purpose in mind in transporting Miss Hickey from Texas to California.

His testimony was to the effect that he abhorred prostitution and that even though he knew his wife was a prostitute, he was constantly trying to get her out of the racket. [R. 321-392.]

His admissions that he had been a pimp [R. 385, 390] was basically the same evidence brought by the rebuttal witness, which evidence is here alleged to have been improperly received.

Thus, the real question may be decided without going into any of the foregoing exceptions. Since the appellant admitted on cross-examination and re-direct examination that he had been a pimp, how could the introduction of such evidence by the government on rebuttal, prejudice the appellant? Of course, the answer is that it cannot.

*A fortiori,* the fact that the appellant was a pimp goes to the question of intent at the time of the transportation. Since it would tend to shed light on this vital issue, it would be material. If a man is engaged in the business of pimping, it infers that a girl transported who is placed in a house of prostitution, is transported for the purpose of prostitution.

The appellant, on cross-examination, did not affirmatively deny or did not state that he had made such a statement as the government was tending to prove. Yet, taking his testimony as a whole, it would indicate that he was denying the statement. His closing remarks on cross-examination, "I don't remember the gentleman there." If he couldn't remember the gentleman—the F. B. I. Agent who heard the statement—he would possibly not remember making the statement to him.

For these reasons, it follows that the trial court did not abuse its discretion in permitting this evidence to be introduced.

### F. Denial of Motion to Produce "Make" Sheets on Government Witness.

The motion was not made after the examination of the victim, Miss Hickey, as the appellant claims in his second opening brief, at page 29, lines 9-12. Nor was it made during the cross-examination of the witness. Rather, the motion was made at the conclusion of the Government's case-in-chief. [R. 269.] Therefore, the motion may have been denied for being untimely.

The appellant contends in his second brief at page 30, lines 8-14, a right to cross-examine the defendant with respect to her criminal record. The appellee has no argument with this much of appellee's contention. For impeachment purposes he may ask any witness regarding prior convictions of any felonies. However, during the cross-examination and recross-examination of Miss Hickey, no such questions were asked of her.

A witness may only be examined as to prior felonies or misdemeanors involving moral turpitude.

*United States v. Howell,* 240 F. 2d 149;

*Steel v. United States,* 243 F. 2d 712, cert. den. 355 U. S. 828, 78 S. Ct. 39, 2 L. Ed. 2d 41.

For impeachment purposes, evidence of witness' arrest is inadmissible, but evidence of his conviction is admissible. (*Beasley v. United States,* 218 F. 2d 366, 368.)

There is no showing by the appellant that any "make" sheets actually existed or contained any exemplified copies of any felony convictions. Counsel for the defendant suggested that such "make" sheets contain "arrests or

police record." [R. 269, lines 24, 25; p. 290, line 1.] At best, any such "record" is hearsay information and does not come within the ruling of the *Jencks* case, the *Andolschek* case or the *Beekman* case, cited by the appellant as their authority for this contention.

The *Jencks* decision is limited to statements or reports of the witness. "Make" sheet or "rundown" is neither a statement or report and hence does not come within this ruling. (*United States v. Jencks,* 353 U. S. 657.)

The documents which were the subject matter in the *Andolschek* case are substantially different than the "make" sheets in this case. There, the criminal prosecution was founded upon those very dealings to which the documents related and the contents of the documents may or may not tend to exculpate the criminality alleged.

Here, the "make" sheets are only hearsay evidence and would not be competent upon which to base a cross-examination or impeachment. The "make" sheets have no bearing upon the criminality of the defendant in the trial court. They do not relate to the appellant or to any element of the crime with which he was charged. Therefore, the critical distinction of the *Andolschek* case would not here apply.

The other case cited by the appellant as authority for this point is *United States v. Beekman, et al.* (C. A. 2d, 1946), 155 F. 2d 580. The holding of that court in relation to this issue was that records, showing that witnesses for the government against the defendant had been disciplined by the government agency which was prosecuting the action and were still in a business subject to the supervision of such agency, and thereby might be facile witnesses against other alleged offenders, were relevant on the question of bias of witnesses. Any such claim of privilege by reason of the confidential nature of the

records must be waived when a criminal proceeding is instituted and the records show the bias of the witnesses.

Three points were there controlling:

That the records actually existed;

That the evidence sought was records of a government agency, apparently otherwise admissible as official records; And that the evidence sought would show the basis for possible bias of prosecution witnesses. Such a showing would make the records relevant.

Here, the "make" sheets of the witness, Miss Hickey, were never shown to have actually existed. Indeed, the government's attorney, Mr. Jensen, stated in open court that the witness had no arrest record. Defense counsel then said if such statements were made in open court by the government's attorney, he would accept such a statement as a fact. The Court ruled that Mr. Jensen did not have to make such a statement. The defendant took no exception to this ruling. [R. 269, 270.]

The "make" sheets would not be admissible as competent evidence to show the arrest record of the witness since such "run-downs" are only records which various agencies: local, national, federal, state, submit to the F. B. I. when an individual is fingerprinted. It may be evidence that the agency submitted fingerprints to the F. B. I., but would be incompetent to show an arrest, or conviction or anything further.

Such an arrest record could in no way show bias towards the appellant.

It could not be relevant for impeachment purposes since a witness may not be impeached by evidence of prior arrests. (*Beasley v. United States, supra.*) Therefore, the appellant has not cited any authority to support this proposition.

## V.
## CONCLUSION.

From the rules and argument set forth above, it is concluded that the trial court committed no error in the trial of the appellant. In the event that it is considered by this court that the trial court committed error, it is urged that the error was harmless.

Respectfully submitted,

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